IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 132

MARGARET L. HOLT and KATHLEEN L. MCMAHON, individually and on behalf of all other shareholders of ALLEGHANY CORPORATION similarly situated,

Petitioners,

against

ALLAN P. KIRBY, CHARLES T. IRELAND, JR., FRED M. KIRBY and ALLEGHANY CORPORATION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF RESPONDENT ALLAN P. KIRBY

We reply only to points newly presented in the reply brief for petitioners.

1. Petitioners' Abandonment of Their Claim that Kirby was Guilty of Fraud.

Petitioners claimed below, and in their main brief here, that Kirby defrauded the *Zenn* Referee and Court. They now abandon this claim, stating that they rather seek to impose liability upon him for "concealment of his co-fiduciaries and co-conspirators, Young and Purcell,"

(Pet. Reply Br., p. 7) and that they "have relied exclusively upon Judge Friendly's view of the case"* (*id.*, p. 8).

The result is that the issues of claimed concealments and fraud are now confined to Young and Purcell. These issues were neither alleged nor tried below. Further, these issues are not reached on this record without first overturning as "clearly erroneous" the findings of fact below that the documents on which this issue rests were cumulative of evidence in *Zenn*. These findings are not challenged (see pp. 4-6 below).

Although petitioners also claimed below that Kirby was under a duty to ferret out such information as might be used against him in the litigation, they now state that "They urge no such rule" (Pet. Reply Br., pp. 13, 21, 29).

2. Petitioners' Record References do Not Show That There was Any Claim of Fraud on the Part of Young and Purcell Before or During Trial.

During trial, petitioners' counsel disclaimed any claim of fraud by Young and Purcell.** Petitioners' quotations

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* Judge Friendly found that there was no personal dereliction on Kirby's part (R. 2351).

** We refer, of course, to the statement of Mr. Updike:

> "Mr. Updike: Well, it seems to me, sir, that if Mr. Kirby entrusts the responsibility to some extent of his being a director of Alleghany, if he entrusts some of that responsibility to Mr. Young, then Mr. Kirby cannot avoid accepting the consequences of whatever Mr. Young may have done, and I do not say that it was Mr. Young and I do not say for a moment that it was Mr. Purcell, and I do not know who is responsible." (R. 606)

It is incredible to argue, in the face of these words, that this is no more than an expression of "counsel's unwillingness, in the last line or two of the quotation, to designate which of the three culprits was actually responsible" (Pet. Reply Br., p. 11). As to Young and Purcell, it is a plain disclaimer.

(Pet. Reply Br., pp. 9-11) from the trial transcript and from the post-trial brief below, made in an effort to escape from the boundaries of par. 39 of the complaint (R. 174-75), merely emphasize this disclaimer.

Not one of these quotations charges any fraud on the part of Young or Purcell, or that Kirby was responsible for any such fraud. Most of the quoted statements were made *after* plaintiffs had completed presentation of evidence on the sole issue tried, the claim that Kirby had defrauded the *Zenn* Referee. Petitioners' counsel was merely asserting that Kirby could not escape his duty (then asserted by petitioners' counsel to be a duty to search out and volunteer documents—a claim now abandoned) by relying on others to do so.* This is a far cry

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* The reference to a duty to ferret out documents is shown in the last quotation on p. 9 of petitioners' reply brief. The full statement of counsel reads as follows:

> "Mr. Updike: No, he [Kirby] is chargeable with knowledge of the documents that he would have known about had he been an active director and president of Alleghany Corporation, and he cannot by being inactive or by tendering his job over to Mr. Young escape liability in connection with a self-dealing transaction where he took stock from Alleghany's portfolio." (R. 699)

The ferreting out of documents is also the main point of the first quotation on p. 9 when it is given in full:

> "Mr. Updike: Only on the basis as I have offered the remainder of these documents, that Mr. Kirby quite independently of what he personally knew as a director and as president of Alleghany could not delegate his responsibility to be a director and to be the president of Alleghany, and in the circumstances that were present in front of Referee Fitzsimmons, even if Mr. Kirby was physically unable to testify, he could have and should have seen to it that the full documentation, the full and frank disclosure that is called for by so many of the authorities in the field was made, and he did not do it." (R. 681)

The remaining quotation, from R. 697, is also a statement of the claim made below by petitioners' counsel that Kirby had a duty to "ferret out" any information discoverable by him.

from the claim, now asserted for the first time, that Young and Purcell had committed a fraud for which Kirby should be held responsible. The ambiguous statements of petitioners' counsel in their *post-trial* brief, to the effect that "Kirby and his co-defendants in *Zenn*" (Pet. Reply Br., p. 10) failed to adduce evidence, did not modify their earlier disclaimer of wrongdoing by Young and Purcell. There were in *Zenn* 15 individual defendants, three corporations and the Murchison Brothers partnership!

Petitioners' effort is not helped by quoting the words "Our case is broader than that" (Pet. Reply Br., p. 11). When counsel made that statement, a colloquy ensued during which the trial judge attempted to ascertain what counsel meant. The conclusion of the colloquy was as follows:

> "The Court: You want to show that these were the files that Mr. Purcell received in Alleghany?
> "Mr. Updike: Yes, sir.
> "The Court: For that purpose, I will receive Exhibit 262 in evidence." (R. 545)

Once again, counsel was claiming no more than that Kirby had a duty to ferret out any documents that had ever been in the files of Alleghany.

3. The Record Refutes Petitioners' Assertion (Pet. Reply Br., pp. 18-19) that the Courts Below Did Not Consider the Excluded IDS Forecasts and Find Them to be Cumulative and Insignificant.

Petitioners still do not confront the challenge of proving that the documents now in question were *not* cumulative of evidence in *Zenn*—an essential ingredient of their cause of action under par. 39 of the complaint. They do not

challenge as clearly erroneous the findings below that the documents relied on by petitioners to show wrongdoing by Young and Purcell (which are the same documents as had been relied on as to Kirby) were insignificant and cumulative. Instead, they contend that the excluded documents were "not considered—and were not the subject of a finding" (Pet. Reply Br., p. 18). On the contrary, these exhibits were the subject of specific discussion and findings by the Court of Appeals (R. 2335-36, 2342, 2348-49),* which concluded that:

> "Examination of the 'non-disclosed' documents leads to the conclusion, also reached by the district court, that although the documents would have been admissible had they been offered before the Referee . . . . . At most they would have been but cumulative evidence upon the basic issue of Kirby's fraud in acquiring IDS . . . ." (R. 2342)

The trial court excluded petitioners' Exs. 245 id. and 246 id. not only for failure to tie them to Kirby but also because the *Zenn* Referee had before him substantially similar evidence (R. 662).**

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* Exs. 245 id. and 246 id. are discussed by the Court of Appeals at R. 2335; Exs. 362 id.-366 id. are discussed at R. 2335-36, and Ex. 365 id. in the concurring opinion of Judge Kaufman at R. 2348-49. These exhibits are discussed in detail in our main brief (pp. 84-85, 125-29, 131-34). Petitioners have made no reply to the points there made.

** Moreover, to the extent that the nature or appearance of those documents (*i.e.*, that they are "official" projections, one being for five years) is deemed important by petitioners, we note that the trial judge received in evidence and evaluated the "official" IDS projection for the year 1949 (Ex. 244, R. 1119) and the "official" IDS projection for the five years 1949-1953 (Ex. 243, R. 1104). This latter projection (Ex. 243, R. 1104) is referred to repeatedly in petitioners' main brief (*e.g.*, Pet. Br., pp. 5, 11-12).

Petitioners have avoided challenging these findings as clearly erroneous. They have not presented any question to raise any such issue before this Court.*

4. Petitioners' Reference to Justice McGivern's Denial of a Motion to Set Aside the *Zenn* Judgment After Commencement of this Action in the Federal Court.

In our main brief, pp. 62, 72-74, 146-51, we argued that the writ should be dismissed for the reason that petitioners have a more adequate, complete and equitable remedy under New York law in the form of an application to the New York court to set aside its *Zenn* judgment. Petitioners now claim that this attempt was made and failed when Justice McGivern in December 1960 denied a motion by two stockholders "to convoke a hearing" to determine the circumstances of the settlement.** The decision does not in any way cast doubt upon the adequacy of such a remedy. That application was made *after* the present action had been commenced in the federal court by the Murchisons. It was based entirely on information and belief, relying solely on the allegations in the pending *Murchison* suit. The Murchisons opposed the application on the ground that they were already actively engaged in prosecution of a plenary action†

* Petitioners confine themselves to the statement that respondent's claim that the findings are not challenged as clearly erroneous is "utterly ridiculous" (Pet. Reply Br., p. 19). They avoid referring to any of the Questions Presented in their brief. There is none in which any such question is presented expressly or implicitly.

** Memorandum opinion of Justice McGivern, Zenn v. Anzalone, N.Y.L.J., p. 10, col. 6 (Dec. 30, 1960).

† The sole claim then alleged was the charge of a "corrupt bargain," which, if proved, would constitute extrinsic fraud under New York law, supporting a collateral attack. After trial it was dismissed and no appeal was taken from that claim.

in the federal courts in which, in addition to attacking the *Zenn* judgment, they were seeking injunctive relief against Phillips (no such relief is now sought) which could not be obtained in the *Zenn* action, in which he was not a defendant. As long as the present suit remained pending, there was no point in the New York court's entertaining an application described by it as "flimsy,"* since the New York court was powerless to enjoin the pending proceeding in the federal court. *Donovan* v. *City of Dallas*, 377 U. S. 408, 412 (1964); *Ableman* v. *Booth*, 21 How. 506 (1859). Dismissal of the present action, however, would not bar the New York court from entertaining an application to set its judgment aside.

5. Plaintiff's Admission Below that the "Concealed" Documents May Have Been Made Available to *Zenn* Counsel is Not Overcome by Petitioners' Citations to the Record.

Petitioners' counsel insist that they made no admission with respect to the availability of the "concealed" documents (Pet. Reply Br., pp. 15-16). The record shows that:

a. Petitioners were asked in Interrogatory No. 5 to list each document referred to in answer to Interrogatory No. 1 (the documents claimed to have been "concealed") that was not seen by or made available for inspection to Graubard, Pomerantz, the Referee, the State court, etc., (R. 222, 225).

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* Justice McGivern said:

> "As sensitive as this court is to any charges which impugn the validity of its actions, it disdains to respond to a request based on affidavits as flimsy and anemic as those submitted herein. The movants do not claim nor do they display any knowledge of probative weight that would support their charges of impropriety. They merely refer to certain complaints, the ground work of other actions, two in the Federal Court, in which fraud is alleged solely on information and belief." Zenn v. Anzalone, N.Y.L.J., p. 10, col. 6 (Dec. 30, 1960).

b. Petitioners answered this, in part, as follows:

> "Plaintiff cannot state whether the documents listed in plaintiff's answer to interrogatory 1 were seen or made available to Seymour Graubard, George Brussel, Jr., Abraham Pomerantz or other counsel for plaintiffs in *Zenn* or *Breswick* or the objectants or intervenors in *Zenn*, Eric J. Klinger, Referee (Special Master) Fitzsimmons or the State or Federal Courts." (R. 288)

c. The further words from the answer to this interrogatory quoted by petitioners (Pet. Reply Br., p. 16), merely emphasize their failure of proof.

Petitioners try to avoid the force of their answer to the interrogatory by making the statement that after the date of this answer both Pomerantz and Graubard testified "that no IDS projections had been supplied to them" (Pet. Reply Br., p. 16). No such testimony was given by Graubard. Graubard's testimony on this point is in our main brief, pp. 118, 120-21, 122-24. Further, Purcell testified that he produced and tendered to Graubard IDS "files and financial statements and projections and reports and matters of that character" (R. 580, 596, 598, 600-01), and invited questions about them.

The record as to Pomerantz (R. 638, 641-42, 643-44, 657-59) is far from clear. His testimony that he never saw Exs. 245 id. and 246 id. (Pet. Reply Br., pp. 16-17) must be weighed against his testimony that "great, great quantities" of documents were produced, some of which were examined by his partner, Haudek, some by his accountant, Klinger, and some by himself (R. 638), and that Haudek and Klinger each examined portions of the mass of documents when Pomerantz was not present (R. 658-59). Thus IDS projections might well have been seen

by Haudek or Klinger and passed over. Petitioners did not call either Haudek or Klinger as a witness.

Nowhere in their reply brief do petitioners meet respondent's detailed analysis of the particular documents, showing that some were in the *Zenn* record, most were cumulative, some did not exist prior to the exchange transaction, etc. Our detailed analysis of these documents as to Kirby (Br., pp. 84-93) and as to Young and Purcell (Br., pp. 125-36), is ignored and uncontroverted.

Petitioners do not satisfy their burden of proof of concealment when they rely on speculation to overcome Purcell's testimony and the other record facts just referred to.

6. Petitioners Do Not Now Have the Option to Reassert the Same Claim Under Section 14(a) of the Securities Exchange Act.

In reply to Points VI and VII of our main brief, petitioners raise only one new point (Pet. Reply Br., p. 24), the argument that if *Zenn* is res judicata here, it would not bar the assertion of a Securities Exchange Act claim in the dormant federal *Zenn* case.

The short answer to this contention is *Kaufman* v. *Shoenberg,* 154 F. Supp. 64 (D. Del. 1954), in which the doctrine of *Williamson* v. *Columbia Gas & Elec. Corp.,* 186 F. 2d 464 (3d Cir. 1950), *cert. denied,* 341 U. S. 921 (1951), was held to bar the reassertion of a claim as one under Section 14(a) of the Securities Exchange Act where the same operative facts had previously been asserted unsuccessfully under state law. The court held that there was only one substantive right, which plaintiffs had the option to assert either as common law fraud, as a fraud under Section 14(a), or as both, but that once they chose

to obtain an adjudication on one of these grounds, all other grounds were merged in the judgment. By the same token, petitioners may not now treat the State *Zenn* proceeding as a trial run and start all over again.

Conclusion

Petitioners now concede that Kirby is not liable for concealing "inside information" himself, or for failing to disclose inside information he "should have known" (Pet. Reply Br., p. 7) or should have "ferreted out" pursuant to a federal common law or statutory duty (*id.*, pp. 13, 21 and 29 and pp. 23, 24, 25 and 27). They rely "exclusively" (*id.*, p. 8) on Judge Friendly's theory of Kirby's vicarious liability for alleged concealments by Young and Purcell, supposedly Kirby's "co-conspirators" in the 1949-50 exchange transaction whose legality was part of the subject matter of the settlement approved as fair in *Zenn*. In short, petitioners' entire case depends upon dicta asserting the illegality of the exchange transaction, an issue settled by *Zenn*, and one which cannot be raised under the complaint and issues in this suit.

Respectfully submitted,

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PETITION FOR REHEARING

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